1956

Fern Gray and Leila Gray v. Edward R. Stevens : Brief of Appellant

Utah Supreme Court

Elias Hansen; Attorney for Appellant;

Case No. 8524

IN THE SUPREME COURT
of the
STATE OF UTAH

FERN GRAY and LEILA GRAY,
Plaintiffs and Respondents,

—vs.—

EDWARD R. STEVENS,
Defendant and Appellant.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF CASE

This is an appeal by Edward R. Stevens from a judgment in favor of the Grays quieting title to a home owned by the respondents as joint tenants, located in Payson, Utah County, Utah.

The respondents claim the property as a homestead. In their claim of a homestead, respondents seek to have the full amount of the homestead provided for by U.C.A, 1955-28-1-1, in the sum of $2750.00 made exempt from a judgment lien of the appellant out of the interest of Fern Gray in and to the home jointly owned by them. The Court below so held and decreed that such home

and the whole thereof was freed from appellant's judgment lien. It is from such judgment that this appeal is taken. Appellant, however, does not claim that respondents do not have a right to an exemption of $2750.00, but he does contend that such exemption does not relieve the property from the judgment lien of the appellant in and to the interest of Fern Gray in and to the property which they had occupied as their home shortly before the trial of this case, and which they had vacated pursuant to an oral agree to dispose of the same.

A summary of the evidence received at the trial and which is brought here for review by a transcript thereof is necessary to an understanding of the matters concerning which appellant complains.

The respondent, Fern Gray, in substance testified as follows:

That he is plaintiff in this case and resides at Springlake; that he is the husband of Leila Gray, the other plaintiff herein; that he acquired the home here involved in March 1941 (Tr. 3). That he made the first payment of $600.00 plus interest, making $762.00 in 1941 and the next payment of $600.00 was made in 1942. That the first payment was with money he received from the sale of cattle which he owned in Wyoming with Kenneth Dix. (Tr. 4). That the money did not come from any profits made out of his partnership with Mr. Stevens. That the partnership with Mr. Stevens came to an end on March 3, 1939; that when the partnership came to an end, he was in debt $4500.00. That the money he paid

on the purchase of the home came from a joint bank account of himself and wife; that he did not acquire title to the property until 1949, but took possession in 1941. (Tr. 5) That the property was taken in the joint names of the witness and his wife; that the property was mortgaged to pay off the debts of plaintiffs (Tr. 6). That the wife of the witness had money of her own which she received from the sale of the cattle business, which money she put into the purchase of the home in controversy. (Tr. 7) The money to pay for the home came out of the joint checking account; that the wife of the witness worked at Gray's Drive Inn (Tr. 8) That there is a second mortgage on the home (Tr. 9) That the second mortgage was made out in 1953 and is for $1100.00; that there was a note given in 1950 by the son and the son's wife for $1100.00 signed by the witness and the wife of the witness for $1100.00; that the note was for money borrowed by the witness and his wife (Tr. 10) that the money owing on the note is around $1600.00. The witness was asked:

> "I call your attention, Mr. Gray, to your complaint which states $1588.00. Which is correct $1600.00 or the 1588.00?"

To which he answered:

> "Well, there has been quite a little paid since that was drawn up."
>
> "Q. But at the time you filed your complaint?
>
> A. It was $1588.00.
>
> Q. That includes principal and interest?

A. Yes.

Q. Has anything been paid on this at all?

A. Not a dime." (Tr. 11)

Mr. Gray further testified that he was living with his wife when he made his declaration of homestead; that he declared the homestead upon his interest to protect his own rights. (Tr. 12). That the cash value of the property is $12,000.00. (Tr. 13).

The second mortgage, the deed to the property, the note and the homestead declaration were marked and received in evidence as Exhibits 1, 2, 3 and 4, respectively.

On cross-examination, Mr. Gray testified that his son had been in possession of the note since it was given; that when the mortgage was given to secure the note, he knew that there was about to be a very substantial judgment rendered against him; that he gave the mortgage for the purpose of prefering the claim of his son over the judgment. (Tr. 17.) That the witness was a defendant in an action brought by Mr. Stevens in which a finding was made "That in addition to the foregoing money chargeable against the defendant, he is chargeable with 31 head of partnership cattle appropriated by him for his own use and benefit; that the date the defendant appropriated such cattle is somewhat uncertain, but as the last partnership cattle were sold on or about March 4, 1939, the defendant is chargeable with said cattle as of March 4, 1939, at a price of $84.41, which was the average price that was received from the partnership cattle and the defendant is chargeable for such cattle the sum of

$2,616.71;" that the witness knew of such finding and that the same wasn't true. (Tr. 18). That in 1940 the witness bought from Jonny B. Jones 100 and some odd cattle; that he did not have these cattle while he was in partnership with Mr. Stevens. (Tr. 19) In answer to the question "when did you buy these cattle that you sold and put the money into this home," the witness answered "now, listen, I bought cattle in 39, March 28 or 29, Pratt Thomas cattle." that the cattle of Stevens and Gray were all gone March 3, 1939; that the witness never had the 31 head of cattle that the court found he misappropriated; that the partnership with Stevens extended from 1936 until the spring of 1939. (Tr. 20). That he borrowed the money from the Utah Livestock Credit Corporation with which to buy the cattle from Jones. (Tr. 20-21). That the witness is not now willing or able to account for where that money went from the sale of those 31 head of cattle, because he never had them. (Tr. 21). That the witness does not remember if he stated in his homestead declaration that the Payson property was worth $12,500.00; that the Payson property is not worth more than $12,000.00; that he is to get $9,000.00 and a little home in Springlake for the Payson property. (Tr. 22); that the Springlake property is not worth over $3,000.00. (Tr. 24) That the witness does not know whether the deal for the disposal of the Payson property and the receiving of the Springlake property has been called off. (Tr. 24).

On redirect examination, the witness testified that when the Stevens and Gray partnership was dissolved,

he was in debt $4500.00; that he did not own any cattle when the partnership was dissolved.

On recross examination, the witness testified that he gave a mortgage on the cattle brought from Jones, and did not give any other security. (Tr. 25).

The plaintiff Leila Gray in substance testified as follows: That she is the wife of Fern Gray and resides in Springlake and a joint owner with her husband of the property in controversy; that she has made the payment on the first mortgage on the Payson property. (Tr. 28). That she sold some property belonging to her and used the money to lease the Loose Ranch and go into the cattle business with her husband and always had a joint account with her husband. (Tr. 28). That she signed the note and mortgage made out to her son and daughter-in-law and used the $1100.00 to open up the drive-in in Payson; that she claims a half interest in the Payson property; that the Payson property has a value of $12,-000.00 (Tr. 29). On cross-examination she testified that she didn't think she lost the money she put into the cattle business at the Loose ranch. (Tr. 30-31). That the partnership proved a loss; that they did not make any money during the three years of the partnership; that with the money made while on the Loose Ranch they bought and sold property, "we didn't buy any property, we bought and sold cattle;" that she was in business as a partner of her husband in buying and selling cattle; that she signed notes with her husband in connection with the partnership between her husband and Stevens, but was

not in that deal. That she was opposed to it. (Tr. 31). That the witness and her husband always had a joint account and shared the profits and losses of the business; that the other deals where money was made or lost on cattle were deals where she and her husband were partners (Tr. 32).

Richard Gray, a witness called by the plaintiffs, testified in substance as follows:

That he is a son of the plaintiffs, that he loaned some money to his father and mother; that his wife had a bank account in a Salt Lake bank in the sum of $600.00 of which she drew out $500.00; that they had a bank account at Payson of which they drew out $300.00 and they had $300.00 in cash at home, making a total of $1100.00 which they loaned to the plaintiffs in 1950 to open up the drive-in in Payson. That the plaintiffs gave a note at the time of the loan; that the plaintiffs said they would give the witness a mortgage on the home to secure the note.

On cross-examination, he stated that he did not ask to have the note secured; that the mortgage was given by his parents on their own initiative. (Tr. 36). That his parents came to him and said: "We are not giving you a payment on this note because we gave you a mortgage on the place." That all of the $1100.00 was in cash; that he never asked them for any payment, but he expected them to pay. (Tr. 37).

Some additional evidence was offered as to the value of the real property here involved by witnesses called

by the plaintiff and by the defendant. Pearl Bigler placed the value of the Payson property at $11,950.00 (Tr. 39) and the Springlake property at $3500.00. (Tr. 58). A Mr. Gale Barron used a somewhat unique theory of values in that he said if a loan of $9,000.00 could be secured on the Payson property it would be worth $12.-000.00; that he has seen the Springlake property from the street and in his opinion, it was worth $3500.00. (Tr. 43). He stated that the usual manner of fixing market value is all wrong. (Tr. 46) Mr. Burdick, a witness called by defendant, placed the market value of the Payson property at $12,200.00 (Tr. 49) and the Springlake property at $3,900.00. Mr. Elmer, a witness called by the defendant, placed the market value of the Payson property at $12,000.00 (Tr. 53) and the Springlake property at $3871.00 and by a different method at $3939.00. (Tr. 54).

Mr. Gray testified that the amount owing on the first mortgage on March 1st was $5830.96 and there was interest since that date which he had not computed. (Tr. 46-47). The files in the case where the judgment was rendered which plaintiffs in their action seek to have the court hold does not constitute a lien on the Payson property was received in evidence. (Tr. 57). This, of course, is a suit in equity and hence this court will review both the law and the facts.

The appellant relies upon the following Points for a reversal of the judgment appealed from:

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF FERN GRAY HAS A HOMESTEAD EXEMPTION IN THE UNDIVIDED ONE-HALF INTEREST OF FERN GRAY IN THE PROPERTY HERE INVOLVED AND THAT SUCH HOMESTEAD EXEMPTION IS $2750.00. (R. 12)

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT THE INTEREST OF LEILA GRAY IN THE PROPERTY HERE INVOLVED IS A ONE-HALF THEREOF, IN ADDITION TO HER RIGHT TO PARTICIPATE IN THE CLAIMED RIGHT OF HER HUSBAND FOR A HOMESTEAD.

POINT III.

THE TRIAL COURT ERRED IN FINDING THAT RICHARD AND DEON GRAY HAVE A VALID AND BINDING MORTGAGE ON THE PREMISES HERE INVOLVED IN THE SUM OF $1588.02 OR IN ANY OTHER SUM. (R. 12)

POINT IV.

THE TRIAL COURT ERRED IN FAILING TO FIND ON ALL OF THE ISSUES IN THIS CASE AND PARTICULARLY IN FAILING TO FIND THAT THE PLAINTIFF FERN GRAY MISAPPROPRIATED 31 HEAD OF CATTLE BELONGING TO THE PARTNERSHIP OF GRAY AND STEVENS. (R. 12)

POINT V.

THE TRIAL COURT ERRED IN ITS CONCLUSIONS OF LAW THAT THE JUDGMENT OF EDWARD R. STEVENS IS NOT A LIEN ON THE INTEREST OF FERN GRAY IN THE PROPERTY HERE INVOLVED AND IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS FERN GRAY AND LEILA GRAY QUIETING IN THEM THE TITLE TO THE

PROPERTY HERE INVOLVED FREE FROM THE JUDGMENT IN FAVOR OF THE DEFENDANT EDWARD R. STEVENS IN CASE NO. 14, 240 (R. 14-15)

ARGUMENT

The statutory laws of Utah that have a bearing on the question presented for review in this appeal are: U.C.A. 1953, 28-1-1, which provides that a homestead shall consist of lands, appurtenances and improvements not exceeding in value the sum of $2000.00 for the head of the family and the further sum of $750.00 for the spouse and $300.00 for each other member of the family.

U.C.A. 1953, 28-1-6 provides:

> "If the homestead claimant is married, the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property."

U. S. A. 1953, 48-1-22, subdivision (c) provides:

> "A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. Where partnership property is attached for a partnership debt, the partners, or any of them, or the representative of a deceased partner can not claim any right under the homestead or exemption laws."

It follows from the provisions of U.C.A. 1953, 28-1-1 and U.C.A., 1953, 48-1-22 that a husband or a wife, or both husband and wife without members of the family are limited to a homestead net value of $2750.00. That is to say the value of the property after all valid liens are deducted from the actual value.

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF FERN GRAY HAS A HOMESTEAD EXEMPTION IN THE UNDIVIDED ONE-HALF INTEREST OF FERN GRAY IN THE PROPERTY HERE INVOLVED AND THAT SUCH HOMESTEAD EXEMPTION IS $2750.00. (R. 12)

It will be seen from the testimony of plaintiff Fern Gray that:

1. A finding was made in the case of *Stevens v. Gray* wherein the judgment was rendered which Gray seeks to have declared not a lien on the property here involved. The court found that Gray misappropriated to his own use 31 head of partnership cattle of Stevens and Gray of the value of $2616.71. (Tr. 18) and File No. 1424 (Tr. 57).

2. That he, Fern Gray, executed a mortgage in favor of his son, Richard Gray, for the purpose of placing a lien on the Payson property which would be prior in time to a judgment which he, Fern Gray, knew was about to be entered in favor of the defendant herein, Edward R. Stevens. (Tr. 17).

3. That Fern Gray received a total of $3482.02 in value of the 31 head of cattle and money out of the Stevens-Gray partnership more than he put into the partnership, while Stevens paid out $9007.16 more than he received from the partnership. See finding No. 20 in Civil Case No. 14,240 which was received in evidence. (Tr. 57).

4. That all of the Gray-Stevens cattle were disposed of on or about March 3, 1939, (Tr. 5).

5. That on March 28 or 29, 1939 he, Fern Gray, bought cattle from Pratt Thomas. (Tr. 20).

6. That in 1940 he bought about 100 head of cattle from Jonny B. Jones with money he borrowed from the Utah Livestock Credit Corporation. That the first payment of $762.00 made on the home was with money he received from the sale of cattle which he had in Wyoming with Kenneth Dix. (Tr. 4).

7. That the $600.00 plus interest that was used to make the first payment on the purchase price of the Payson property came from a joint account of Mr. Gray and his wife. (Tr. 5).

8. That the plaintiffs were engaged in several ventures and kept a joint bank account of their receipts and expenses. (Tr. 28-31, 32).

There is other testimony given by Mr. Gray which is at variance with testimony above referred to. Thus, he testified that he did not get any money from the sale of the partnership cattle owned by him and Mr. Stevens. He testified that he was in debt $4500.00 when the partnership between him and Stevens came to an end on March 3, 1939, (Tr. 5) and yet within less than a month after the partnership came to an end, he bought cattle from Pratt Thomas. He does not tell us anything about where he received the money with which to buy the Thomas cattle. He testified that the cattle he sold and

used some of the money received from the sale was purchased with money borrowed from the Utah Livestock Credit Corporation. (Tr. 21). It is to say the least extremely improbable that the Utah Livestock Credit Corporation, or any other money lender, will loan sufficient money to buy 100 head of cattle with no security except a mortgage on the cattle purchased. Mr. Gray fails to inform us of any money he received other than the money he must have received from the proceeds of the sale of the Gray-Stevens cattle and particularly the 31 head that he misappropriated. He received $3482.02 more out of the partnership with Stevens than he put in. The court so found.

The law applicable to such a state of facts has received judicial application on numerous occasions. The authorities are all to the effect that:

> "A judgement rendered by a court having jurisdiction of the parties and subject matter is conclusive and undisputable evidence as to all rights, questions or facts put in issue in the suit and actually adjudicated thereon where the same comes again into controversy between the same parties or their privies, even though according to the decision on the questions, the subsequent proceedings are on a different cause of action, since the law abhors a multiplicity of suits."
> 50 C.J.S. page 168, Sec. 711.

To the same effect is the law stated in 50 C.J.S. page 141, Sec. 686. Among the numerous cases cited from state and federal courts in support of the text are these from Utah:

Matthews v. Matthews, 102 Ut. 428; 132 Pac. (2d) 111; *State v. Erwin,* 101 Ut. 365, 120 Pac. (2d) 285; *Boland v. Erwin,* 79 Ut. 331; 10 Pac. (2d) 930. Other Utah cases are cited in the foregoing Utah cases.

So also is the law settled in this and other jurisdictions that the burden is on the one who claims a right to a homestead to establish the same. *Zuniga v. Evans,* 87, Ut. 198, 48 Pac. (2d) 513; 101 A.L.R. 532; *Gordon v. Harper,* 106 Ut. 560, 151 Pac. (2d) 99, 102; 154 A.L.R. 906.

So also do the authorities teach that if money is misappropriated by a person and applied on the purchase of a homestead, the person or one in privity with such person may not successfully claim a right to a homestead exemption as against the person whose money has been misappropriated and applied on the payment of the claimed homestead. Following are among the authorities so holding: *Gustan J. Warso, Jr. Admr. v. Ashkosh Savings & Trust Co.* 47 A.L.R. 366; 190 Wis. 87; 208 N.W. 886.

We quote the following from the syllabi of the case above cited in 47 A.L.R. 366:

> "It was never contemplated nor intended that a homestead shall be created and maintained with stolen or embezzled property, or by wrongful appropriation of property rightly belonging to another. If this were so, the statute exempting a homestead instead of promoting the public welfare would operate as an immoral and baneful influence undermining and destroying the fundamental principles of government."

In 3 Pomeroy Equity Jurisprudence, 4th Ed. pp. 3297-2401 it is said:

> "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. Equity impresses a constructive trust upon the new form or species of property (where property is wrongfully taken) not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosoever's hands it may come, except into those of a bona fide purchaser for value and without notice, and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded."

See also 47 A.L.R. 369, et seq. *American Railway Express Company v. Dolphus J. Hauli,* et al, 48 A.L.R. 1266 et seq. We refrain from citing other authorities because the law above cited seems to be of universal application as we have found none to the contrary.

There is a rule of law of general application which is thus stated in 20 Am. Jur. 145-146:

> "The ommission by a party to produce important testimony relating to a fact of which he has knowledge and which is peculiarly within his own control raises the presumption that the testimony, if produced, would be unfavorable in his case. In such case the burden of coming forward with proof is upon the party who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge or of which he is supposed to be cognizant."

Numerous cases are cited in foot notes to the text which

support the general rule as well as exceptions thereto. Independent of the law just quoted, the burden of proof was on the plaintiffs to establish the claimed homestead. It is so held in the Utah cases heretofore cited. The defendant obviously could not know what the plaintiff, Fern Gray, ultimately did with the profit of $3482.02 which he made out of the partnership with Stevens, and in which Stevens took a loss of $9007.16. Plaintiff Fern Gray contented himself with saying he did not get the 31 head of cattle. However, according to his own testimony he purchased some cattle from Pratt Thomas within a month after the Stevens-Gray partnership cattle were all sold. He does not tell where he received the money to buy the same, or when he sold the same, or what he did with the money. According to the testimony of Mr. Gray he bought some 100 odd cattle from Jonny B. Jones (Tr. 19). The only explanation he gave of where the money came from to buy those cattle is the extremely improbable statement that he borrowed the same from the Utah Livestock Credit Corporation and gave a mortgage to secure the same. (Tr. 21). These various transactions, according to Mr. Gray, were all carried on by checks drawn on a joint account of the plaintiffs herein. (Tr. 7-8).

Under the facts established in this case the law thus announced in 20 Am. Jur. 145-6, Sec. 140 is especially applicable.

> "The broad rule prevails that the omission of a party to produce important testimony relating to a fact of which he has knowledge and which

> is peculiarly within his own control raises the presumption that the testimony if produced, would be unfavorable to his cause. In such case the burden of coming forward with proof is upon the part who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."

Among cases where this rule of law has been applied are: *City of Fort Smith vs. Dodson,* 11 S.W. 687; *Fowler Parking Co. v. Erzenperger,* 94 Pac. 995,; *First Nat'l Bank of Davenport v. Baker* et al, 10 N.W. 633; *Protective Life Ins. Co. v. Swenk,* 222 Ala. 496; 132 So. 728. In 130 A.L.R., page 480, and in 23 A.L.R. (2d) at page 1271 will be found an annotation of the law now being discussed. Numerous cases will be found collected in 130 A. L. R. page 480, and 23 A. L. R. (2d) 1271 only a few of which are heretofore cited. As applied to this case obviously the defendant, Mr. Stevens could not ascertain with certainty just what Mr. Gray did with the profit in the sum of $3482.02 which he unlawfully appropriated to his own use out of the Stevens-Gray partnership. It is made to appear that the money went into the joint account of the plaintiffs herein, and that the money applied on the purchase of the Payson property, which is claimed as a homestead, came out of that fund. In such case the presumption prevails that the money that went into the purchase of the claimed exempt property came from the money misappropriated as otherwise Mr. Gray would have testified as to what he did with that money.

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT THE INTEREST OF LEILA GRAY IN THE PROPERTY HERE INVOLVED IS A ONE-HALF THEREOF, IN ADDITION TO HER RIGHT TO PARTICIPATE IN THE CLAIMED RIGHT OF HER HUSBAND FOR A HOMESTEAD.

What has been said under Point One is applicable as to the claim of the plaintiff, Leila Gray, to the claim of her husband Fern Gray. If the claim of Fern Gray fails because of the facts and the law discussed under Point One, any claim that Leila Gray may seek to establish by reason of a claim founded on her husband's claim must of necessity fail. She is in privity with her husband in so far as she seeks to avail herself of a right to benefit by reason of the claim of a homestead right of her husband. The word privity has been variously defined as will be seen from the text and cases cited in 72 C.J.S. pp. 954 to 962. Among the definitions one of the most generally accepted is that privies are those persons who have mutual or successive relationship to the same rights of property or subject matter as is possessed by the parties to the litigation as themselves. Moreover while Mrs. Gray testifies that she was opposed to Mr. Gray going into partnership with Mr. Stevens (Tr. 31) she did testify that she signed notes with him in connection with that partnership; that she was engaged in business with her husband in other properties in buying and selling cattle. (Tr. 31-32). So far as appears Mrs. Gray was not opposed to the money which Mr. Gray received for the 31 head of cattle that he misappropriated going

into their joint account and being used for conducting their business including the purchase of the home which is being claimed as exempt by both Mrs. and Mr. Gray. It will be noted that the court found that Mrs. Gray owned a fee simple title to a one-half interest in the property here involved. As we understand the law, two persons who are joint owners of a track of land are not thereby owners in fee simple of an undivided one-half interest therein. It will be noted that under the provisions of U.C.A. 1953, 48-1-22, subdivision (c) partnership property is liable for attachment for a partnership debt. While the judgment here involved runs only against Mr. Gray, if Mrs. Gray was a silent partner, as she appears to have been in the Stevens-Gray partnership, she is liable for the money which Mr. Gray wrongfully appropriated from that partnership. We shall have more to say about the joint ownership of the Payson property later in this brief.

POINT III.

THE TRIAL COURT ERRED IN FINDING THAT RICHARD AND DEON GRAY HAVE A VALID AND BINDING MORTGAGE ON THE PREMISES HERE INVOLVED IN THE SUM OF $1588.02 OR IN ANY OTHER SUM. (R. 12)

There are, to put it mildly, a number of circumstances surrounding the giving of the second mortgage here involved which indicate that the sole purpose in giving the same was an attempt to fortify the claim of a homestead exemption. On direct examination, Mr. Gray first testified that there was around $1600.00 owing on the mortgage to his son and daughter-in-law. When at-

tention was called to the allegation of his complaint that $1588.00 was due, he testified that there had been quite a little paid since that was drawn up and when aided further by questions by his counsel, he said not a dime had been paid. (Tr. 11). On cross-examination, he testified that when he gave the mortgage he knew that a very substantial judgment was about to be rendered against him. (Tr. 17). By his homestead declaration he placed the value of the Payson property at 12,500.00 but he testified at the trial that it was not worth over $12,-000.00. The note of $11,000.00 and the claimed interest thereon makes up an amount necessary to support the claim for a complete exemption on the assumption that the full exemption can be taken out of Mr. Gray's interest in the property.

Richard Gray testified that the money he loaned to his parents was all cash, $500.00 his wife had in Zion's Savings Bank at Salt Lake, $300.00 in a bank at Payson and $300.00 in cash they had in the house; that he did not ask for the mortgage. (Tr. 36-37) Not a centila of documentary evidence was offered in support of the claim as to where the money came from that is claimed to have been loaned. For some reason, not accounted for, the daughter-in-law was not called to testify. An examination of the note will reveal that it has none of the characteristics that one would expect in an instrument that was claimed to be more than five years old at the time of a trial. If a family scheme such as is revealed by the evidence in this case is to receive judicial approval, then indeed the language above quoted in the

statute providing for a homestead exemption instead of providing for the general welfare would operate as an immoral and baneful influence undermining and destroying the fundamental principles of government.

POINT IV.

THE TRIAL COURT ERRED IN FAILING TO FIND ON ALL OF THE ISSUES IN THIS CASE AND PARTICULARLY IN FAILING TO FIND THAT THE PLAINTIFF FERN GRAY MISAPPROPRIATED 31 HEAD OF CATTLE BELONGING TO THE PARTNERSHIP OF GRAY AND STEVENS. (R. 12)

It will be seen that the Court below found that the allegations and averments of plaintiffs' complaint are true — that all of the denials and allegations and averments of said answer and amended answer adverse to and inconsistent with plaintiffs' complaint are untrue. Such a so-called finding has been repeatedly condemned by this court. *Baker v. Hatch.* 76 Ut. 1, 257 Pac. 673. Numerous other Utah cases where the same doctrine is announced will be found collected in foot notes 2 and 3 of 257 Pac. at page 674. The court makes no findings that in case No. 14,240 civil the court made the findings alleged in the additional answer of the defendant. (R. 9). While the plaintiff, Fern Gray, denied the facts there found as we have heretofore pointed out, he is bound by such findings. The defendant is entitled to a finding in conformity with his allegations contained in his additional answer. (R. 9). Apparently the court found to the contrary.

POINT V.

THE TRIAL COURT ERRED IN ITS CONCLUSIONS OF LAW THAT THE JUDGMENT OF EDWARD R. STEVENS IS NOT A LIEN ON THE INTEREST OF FERN GRAY IN THE PROPERTY HERE INVOLVED AND IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFFS FERN GRAY AND LEILA GRAY QUIETING IN THEM THE TITLE TO THE PROPERTY HERE INVOLVED FREE FROM THE JUDGMENT IN FAVOR OF THE DEFENDANT EDWARD R. STEVENS IN CASE NO. 14, 240 (R. 14-15)

It is provided in U.C.A. 1953, 28-1-8 that:

> "It shall be the privilege of either the husband or the wife to claim and select a homestead to the full extent prescribed in this title on the failure of the other, being the judgment debtor, to make such claim or selection."

U.C.A. 1953, 28-1-6 provides that:

> "If the homestead claimant is married, the homestead may be selected from the *separate* property of the husband or with the consent of the wife from her *separate* property."

In this case the property here involved was doubtless a homestead of the plaintiffs without the formal act of making the declaration indicated by Exhibit P-4. A homestead, as the authorities teach, is for the protection of the husband and wife and other members of the family.

U.C.A. 1953, 28-1-5 provides that the phase "head of a family as used in this title includes within its meaning:

1. The husband and wife, when the claimant is a married person, but in no case are both husband and wife entitled each to a homestead."

It was urged in the Court below that the case of *Williams v. Peterson,* 86 Utah 526, 46 Pac. (2d) 674 gives support to the claim that plaintiff Fern Gray may make a selection of a homestead to the full amount of $2750.00 because he is a joint owner of the property here involved. There are various reasons why that case is not controlling in this case. In that case the wife had taken a mortgage on her husband's interest in a tract of land held as tenants in common by the husband and wife. The husband had taken $5000.00 from a joint account and made a poor investment of the same. The wife objected to the husband making the investment; the husband gave a note to the wife for $4500.00, which he renewed for $5220.00 and gave a mortgage on property owned by the husband and wife as tenants in common which, however, was not occupied by them as their home. In this case the money which Mr. Gray unlawfully appropriated went into the joint account of the plaintiffs and thus enriched both of the plaintiffs. Neither of the plaintiffs accounted for the money misappropriated and that being so, the presumption is that it went into the purchase of the home. The language above quoted, namely "in no case are both husband and wife entitled each to a homestead" cannot, without ignoring its plain meaning, be construed to mean that the plaintiffs are each entitled to $2750.00. The interest that Mrs. Gray owned in the Payson property was as much a part of the Gray homestead as was the interest of Mr. Gray. To hold otherwise would be to engage in a process of metaphysical reasoning which has no place in law. It

will further be noted that the statutes U.C.A. 1953, 28-1-6 and 28-1-8 permits the selection to be made out of the separate property of the husband or the wife. In this case the interest which Mr. Gray had in the Payson property was in no sense his separate property. Quite the contrary, property held in joint tenancy by a husband and wife may not be said to be held in severalty by the husband and wife. We do not contend that a husband and wife are not entitled to a homestead in the amount fixed by law in a home jointly owned. If the decision appealed from is permitted to stand, it will mean that the Grays are entitled to twice the amount of homestead exemption that is permitted by the statute. It has become a common practice for a husband and wife to take title to a home as joint tenants. It may be inquired is there any reason why in such case if a judgment is rendered against one of the spouses the full amount of exemption should be allowed such spouse and in addition thereto the interest of the other spouse should remain intact, while on the other hand, if a judgment is rendered against a spouse holding the entire title, the limit of the homestead exemption is that fixed by law.

It is said by this court in the case of *Kemball v. Lewis,* 17 Ut. 381, 53 Pac. 1037, that the homestead act

> "was intended to secure and protect the home against creditors and as a means of support to every family in the state."

That being the purpose of the homestead law, there is no reason why a husband and wife who hold the title to

a home as joint tenants are entitled to a greater protection than are those who may have the title in the name of the spouse against whom a judgment is rendered. To hold otherwise would constitute class legislation and offend against the provisions of Article VI, Sec. 26, subdivision 18, Constitution of Utah, wherein it is provided that:

> "In all cases where a general law can be applicable, no special law shall be enacted."

If Mr. Gray may successfully claim a homestead for the full amount out of his share in the Payson property free from a judgment against him, by the same token Mrs. Gray may succeed in making a claim of a homestead for the full amount of her interest in the Payson property. Mr. Gray cannot deprive Mrs. Gray of a right to make a homestead claim by himself making such a claim. Attention is again called to the provisions of U.C.A. 1953, 28-1-5 which provides that either the husband or the wife may make the selection, but in no case are both husband and wife entitled to a homestead.

The right to a homestead is the creature of statutory law. The common law does not grant a right to a homestead. We have examined a number of statutes and decisions of the various states and have been unable to find two states that have identical laws. Thus in some states property held by two or more persons as joint tenants is not subject to a homestead exemption. In others it may be, especially if the joint tenants are husband and wife. See 40 C.J.S. Sec. 88, page 140. In some

states where a homestead is held jointly by a husband and wife, each must contribute one-half to the homestead. The case of *Johnson v. Nuntz,* 364 Ill. 482, 4 N.E. (2d) 826 is such a case. A similar doctrine seems to be the law in Oklahoma. *Mitchell v. Quinton,* 116 Pac. (2d) 995. We, however, do not wish to undertake to discuss the various laws dealing with homesteads. To do that would extend this brief beyond reasonable limits, but would probably be of little, if any, aid in the proper construction of the statutes of Utah.

Because of the reasons herein stated, it is submitted that the judgment appealed from should be reversed and this court direct the court below to enter judgment denying the plaintiff Fern Gray any homestead right in and to the property here involved.

Respectfully submitted,

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